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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

9 LAQUAN MCDONALD,

10 Defendant.

Case No. 2:19-cr-00312-KJD-VCF

11 **ORDER**

12 This matter is before the Court on Defendant Laquan McDonald's Emergency Motion for
13 Temporary Release Under 18 U.S.C. § 3142(i) Due to COVID-19 Pandemic (ECF No. 22), filed
14 on March 30, 2020. The Court ordered a response be filed by April 1, 2020. (ECF No. 23). The
15 Government timely filed its Response (ECF No. 24) on April 1, 2020. The Court finds this
16 matter appropriately resolved without a hearing.

17 **I. BACKGROUND AND PROCEDURAL HISTORY**

18 **a. Original Detention Decision**

19 On December 4, 2019, a federal grand jury returned a one-count criminal indictment
20 charging Defendant with felon in possession of a firearm. (ECF No. 1). On December 5, 2019,
21 Defendant appeared before the Court for his detention hearing and the Court ordered Defendant
22 detained pursuant to 18 U.S.C. § 3142, based on a finding that no condition or combination of
23 conditions would reasonably assure both Defendant's appearance as required and the safety of
24 any other person and the community, and by a preponderance of evidence that no condition or
25 combination of conditions of release will reasonably assure Defendant's appearance. (ECF No.
26 13). The Court included the following reasons for detention: Defendant's prior criminal history;
27 participation in criminal activity while on probation, parole, or supervision; history of violence or
28 use of weapons; history of alcohol or substance abuse; lack of stable employment; lack of

1 financially responsible sureties; prior failure to appear in court as ordered; and, prior violations of
2 probation, parole, or supervised release. (*Id.* at p. 2-3).

3 On December 6, 2019, Defendant filed a Motion to Reopen the Detention Hearing. (ECF
4 No. 6). Defendant requested release to his uncle's home. On January 6, 2020, the Court denied
5 Defendant's request for release and detained him pending trial. (ECF No. 18).

6 **b. Temporary Release Arguments**

7 Now, in the instant Motion, Defendant requests not reopening of his detention hearing, but
8 temporary release. (ECF No. 22). Defendant makes a number of arguments in favor of his
9 temporary release. First, he argues that the Fifth Amendment requires his release because
10 COVID-19 presents a significant harm outweighing the Government's interest in confinement.
11 Specifically, he claims that the current conditions of confinement create an unreasonable risk of
12 exposure to COVID-19 and do not provide the necessary personal hygiene supplies to protect
13 him. (ECF No. 22, p. 12-13). Defendant also claims that COVID-19 testing is not being offered
14 to inmates or him specifically.

15 Second, Defendant argues that the Eighth Amendment prohibition against cruel and
16 unusual punishment compels release. He contends that unreasonable risk of COVID-19
17 contradiction violates the Eighth Amendment and amounts to deliberate indifference to his health.
18 (ECF No. 22, p. 13-16).

19 Third, Defendant argues that the Bail Reform Act requires his release as the circumstances
20 have changed due to Defendant's asthma creating a heightened health risk during this pandemic
21 and release is necessary to his defense. (ECF No. 22, p. 16-17). He acknowledges that he has not
22 had any recent asthma attacks at Nevada Southern Detention Center (NSDC). (*Id.* at p. 18).
23 Defendant claims there are conditions of release available that ameliorate the danger he may pose
24 to the community. He proposes residing with his girlfriend and children while on GPS location
25 monitoring. (*Id.*) Further, Defendant argues that he is not safer in prison during this pandemic
26 due to some reported cases of COVID-19 in prisons across the country and believed shortage of
27 sanitary supplies.
28

1 The Government responds that the Court should deny the Motion for several reasons.
2 First, release is not necessary to Defendant's defense. It contends that Defendant's attorney is
3 permitted contact visits at NSDC at this point, but even if she becomes restricted to telephone and
4 video conference calls to prepare his defense, that would not unnecessarily hamper his ability to
5 prepare his defense. Further, the Government argues that if Defendant was released, his counsel
6 would not necessarily want in person meetings and the Court has already limited in person court
7 appearances. Finally, the trial has been continued to July 13, 2020, which leaves a long
8 preparation period for him and his counsel.

9 Second, there is no compelling reason for release pursuant to Section 3142(i). The
10 Government argues that Defendant has not demonstrated that he is at high risk of becoming
11 severely ill from COVID-19, that his risk of contracting COVID-19 in custody is significantly
12 higher than his risk if released, or that NSDC is unequipped to provide medical treatment if he
13 becomes infected. The Government contends that NSDC has protocols in place to combat
14 infectious diseases in the prison population. Additionally, the Government highlights that
15 Defendant merely claims he was diagnosed with asthma as a child and did not provide any further
16 medical information to verify the severity of his condition and why it would make him high risk.
17 The Government also underscores discovery in this case produced video clips of Defendant
18 smoking.

19 Third, the Government argues that Defendant merely asserts because he has an available
20 place to live and due to his asthma, which he has not had an attack since 2018, his risk of
21 nonappearance and danger to the community will be mitigated in light of the speculative prospect
22 of a COVID-19 outbreak at NSDC. To the contrary, the Government claims Defendant is a poor
23 choice for release due to him being a flight risk with no financial ties to this community, lack of
24 lawful employment since 2005, his criminal history, his gang affiliation, and is facing a parole
25 violation sentence in California. Further, the Government highlights that location monitoring is
26 no longer an option given social distancing and it would put pretrial officers at risk. Also,
27 Defendant would not be permitted to remain in Las Vegas if released as he would be required to
28 be transferred to California for violation parole and detained in a facility in California.

II. LEGAL STANDARD

The Bail Reform Act of 1984 mandates that every person charged with a federal offense be given a detention hearing. 18 U.S.C. § 3142(a). If the Court finds the defendant poses a danger to public safety or a flight risk, the Court may order the defendant detained pending trial. 18 U.S.C. § 3142(f). Section 3142(i) permits a judicial officer to “permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.” Courts have used this provision “sparingly to permit a defendant’s release where, for example, he is suffering from a terminal illness or serious injuries.” *United States v. Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (citations omitted).

A defendant bears the burden of establishing circumstances warranting temporary release under § 3142(i). *United States v. Clark*, 2020 WL 1446895, at *2 (D. Kan. Mar. 25, 2020); *see also United States v. Buswell*, 2013 WL 210899, at *5 (W.D. La. Jan. 18, 2013) (collecting cases). Most courts addressing a motion for temporary release under § 3142(i) have done so in the context of evaluating the necessity of the defendant assisting with preparing his or her defense. *Clark*, 2020 WL 1446895, at *2; *see, e.g., United States v. Cecerle*, 2014 WL 31674, at *4 (D. Nev. Jan. 3, 2014); *United States v. Dupree*, 833 F.Supp. 2d 241, 247 (E.D.N.Y. 2011); *United States v. Jeffries*, 2011 WL 182867, at *4 (E.D.Tenn. Jan. 20, 2011); *United States v. Hazelwood*, 2011 WL 680178, at *3 (N.D. Ohio Feb. 16, 2011). Courts considering whether pretrial release is “necessary under § 3142(i) have considered: (1) time and opportunity the defendant has to prepare for the trial and to participate in his defense; (2) the complexity of the case and volume of information; and (3) expense and inconvenience associated with preparing while incarcerated. *Cecerle*, 2014 WL 31674, at *4.

Relatively little guidance exists about what qualifies as a “compelling reason” for temporary release under § 3142(i). Some courts have considered a defendant’s serious medical condition compelling. *See, e.g., United States v. Rebollo-Andino*, 312 Fed.App’x 346, 348 (1st Cir. 2009) (noting that defendant could seek temporary release under § 3142 for medical reasons).

1 Courts typically grant relief under § 3142(i) only “sparingly to permit a defendant’s release
2 where, for example, he is suffering from a terminal illness or serious injuries.” *United States v.*
3 *Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020); *see e.g., United States v. Scarpa*,
4 815 F.Supp. 88 (E.D.N.Y. 1993) (permitting the defendant’s release under the 24-hour guard of
5 the U.S. Marshal Service at his own expense because of traumatic gunshot injury and terminal
6 AIDS diagnosis and correctional authorities could no longer manage his medical conditions);
7 *United States v. Cordero Caraballo*, 185 F.Supp. 2d 143, 144-47 (D.P.R. 2002) (ordering release
8 of defendant who sustained multiple gunshot wounds, was partially paralyzed, could not walk,
9 lost some arm function, who required the supervision of 4-5 contracted security guards on a daily
10 basis, where Bureau of Prisons could not provide required medical care).

11 **III. DISCUSSION**

12 The Court is mindful of the unprecedented magnitude of the COVID-19 pandemic and the
13 extremely serious health risks it presents, particularly within the jail and prison setting. The rate
14 at which COVID-19 is spreading and affecting communities around the world is alarming. Governor
15 Steve Sisolak declared a State of Emergency in Nevada on March 12, 2020. Nevada’s K-12 schools
16 have been closed since March 16, 2020. Most unprecedented, casinos have announced complete
17 closure of their properties. On March 20, 2020, Nevada’s governor issued an order closing all non-
18 essential business to the public and pleading for individuals to stay in their homes.

19 This Court has also taken measures to protect the public, staff, and litigants. *See* General
20 Order 2020-02 and Temporary General Orders 2020-03 and 2020-04. The DOJ also announced it
21 may investigate and prosecute individuals who intentionally spread the virus, referred to as a
22 “biological agent” and potentially implicating terrorism-related statutes. However, no cases have
23 been reported at NSDC, located in Pahrump, Nevada, which is where Defendant is currently detained.

24 **a. Constitutional Basis for Temporary Release**

25 Defendant bases his temporary release request, in part, on the Fifth and Eighth Amendments
26 to the U.S. Constitution. In evaluating whether a condition of pretrial detainment violates the Fifth
27 Amendment, the question is whether the condition amounts to punishment. *Bell v. Wolfish*, 441 U.S.
28 520, 535 (1979). The United States Supreme Court has stated that if a particular condition or

1 restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does
2 not, without more, amount to “punishment.” Conversely, if a restriction or condition is not
3 reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may
4 infer that the purpose of the governmental action is punishment that may not constitutionally be
5 inflicted upon detainees qua detainees. *Id.* at 539; *see also Demery v. Arpaio*, 378 F.3d 1020, 1028
6 (9th Cir. 2004) (applying same rule). Thus, the question before this Court is whether detaining
7 Defendant is reasonably related to a legitimate government objective.

8 This Court finds that Defendant’s detention is reasonably related to legitimate government
9 interests, namely, protecting the community and ensuring his appearance at trial as outlined in its
10 original detention order. (ECF No. 13). The Court does not find that any of the grounds for detention
11 have changed. The recent COVID-19 pandemic does not change the analysis under the Fifth
12 Amendment’s Due Process Clause.

13 Similarly, the Court does not find that the analysis under the Eighth Amendment supports
14 temporary release given all of the grounds for detention and no evidence that NSDC is unable to
15 provide sufficient medical treatment to Defendant in light of him contracting COVID-19 in custody.
16 There is also no evidence that Defendant has a higher risk of contracting COVID-19 in custody than
17 when released, as proposed, to meet the deliberate indifference to medical needs standard. Therefore,
18 the Court does not find any constitutional basis supports Defendant’s temporary release request.

19 **b. Bail Reform Act Basis for Temporary Release: Compelling Reason or**
20 **Preparation of Defense**

21 A defendant should not be entitled to temporary release under § 3142(i) based solely on
22 generalized COVID-19 fears and speculation. *Clark*, 2020 WL 1446895, at *3. Instead, the court
23 must make an individualized determination as to whether COVID-19 concerns present such a
24 compelling reason in a particular case that temporary release is necessary. *Id.* The Court will
25 evaluate the following four factors: (1) the original grounds for Defendant’s pretrial detention; (2)
26 the specificity of Defendant’s stated COVID-19 concerns; (3) the extent to which the proposed
27 release plan is tailored to mitigate or exacerbate other COVID-19 risks to Defendant; and (4) the
28 likelihood that Defendant’s proposed release would increase COVID-19 risks to others. *Id.* The

1 Court will not necessarily weigh these factors equally, but will consider them in their entirety to
2 determine whether a “compelling reason” exists such that temporary release is necessary in the
3 instant case. *Id.*; § 3142(i). Here, all of the factors relevant to the Court’s analysis of the
4 compelling reason basis for temporary release weigh in favor of denying release.

5 **i. The Original Grounds for the Defendant’s Pretrial Detention**

6 The Court finds that the grounds for its detention decision still apply. There has been no
7 change to the following reasons that the Court relied on for its original detention decision:
8 Defendant’s prior criminal history; participation in criminal activity while on probation, parole, or
9 supervision; history of violence or use of weapons; history of alcohol or substance abuse; lack of
10 stable employment; lack of financially responsible sureties; prior failure to appear in court as
11 ordered; and, prior violations of probation, parole, or supervised release. (ECF No. 13, p. 2-3).

12 **ii. The Specificity of the Defendant’s Stated COVID-19 Concerns**

13 Moreover, the Court agrees with the Government that Defendant’s stated COVID-19
14 concerns are not specific enough to pass the line beyond pure speculation. He generically claims
15 to have asthma, but without any asthma attack since 2018. The Court fails to find that a
16 compelling reason for temporary release. Defendant submits no specific COVID-19 risk; rather,
17 his arguments are too speculative or generalized to favor release. *See Sanders*, 2020 WL
18 1528621, at *5 (motion for temporary release denied where defendant asserted no specific
19 personal health risk factor).

20 Further, Defendant cannot predict the extent to which COVID-19 cases might arise at
21 NSDC. Nor can he predict the extent to which he may be exposed to the virus if allowed to live
22 in Las Vegas. Defendant also cannot predict how NSDC might respond to an outbreak any more
23 accurately than many Americans can predict how their local hospitals might respond. While
24 inmates may not be able to fully adhere to optimal social distancing guidelines, these
25 circumstances are generalized to all individuals in the prison system and are not unique to
26 Defendant. The Court, however, “cannot release every detainee at risk of contracting COVID-19
27 because the Court would then be obligated to release every detainee.” *United States v.*
28 *Fitzgerald*, 2020 WL 1433932, at *2 (D.Nev. March 24, 2020).

Moreover, the Court does not agree with Defendant's conclusory statements that NSDC is not utilizing proper protocols to ensure a COVID-19 outbreak does not occur. In fact, there are no reported COVID-19 cases at NSDC. There is also no evidence that NSDC does not have the proper sanitation supplies or medical treatment ready if Defendant were to contract COVID-19. As such, Defendant's speculation that his asthma alone is enough to make him high risk is a fatal flaw to his request for temporary release.

iii. The Extent to Which the Proposed Release Plan is Tailored to Mitigate or Exacerbate the Defendant's Overall COVID-19 Risks

Additionally, the Court finds that Defendant's proposed release plan to be on GPS monitoring at his girlfriend's home fails to mitigate his flight risk and danger to the community. Defendant offers no evidence to explain how the proposed living situation mitigates the risk of infection. For example, Defendant fails to explain who else has or will live in or frequent the home or identify any screening practice or concrete COVID-19 precautions taken there. Defendant therefore offers nothing more than mere speculation that home detention would be less risky than detention at NSDC, which has screening practices and other reasonable COVID-19 precautions in place.

Defendant also fails to address the risk of exposure while en route from NSDC in Nevada to California. As the Government underscores, Defendant would not be permitted to remain in Las Vegas as he would need to be transferred to California for the parole violation he is facing. Defendant does not address, once there, the capacity of California's health care system to provide him with adequate treatment if Defendant were to contract the virus.

In contrast, if Defendant remains at NSDC, he has access to medical care should he become ill. NSDC has ample motivation to prevent any outbreak and, even if an outbreak occurs, to contain and manage it for the well-being of all involved. The record is void of information suggesting NSDC would be unable to render appropriate medical treatment to Defendant if he became ill. To the contrary, the Court is convinced that NSDC has established a comprehensive plan to manage the facility during the pandemic. Thus, the Court finds that Defendant's unexplained, conclusory allegations regarding NSDC's inability to manage the care of inmates

1 during the pandemic does not rise to the level of justifying temporary release based on COVID-19
2 concerns.

3 **iv. The Likelihood that Defendant's Proposed Release Plan Would**
4 **Increase COVID-19 Risks to Others**

5 Finally, the likelihood of Defendant's proposed release increasing COVID-19 risks to
6 others is high. There are no assurances that Defendant would comply with the Governor's shelter
7 in place order and not violate conditions of release, as Defendant has in the past. *See Clark*, 2020
8 WL at 1446895, at *7. Given the Section 3142 considerations discussed previously, the Court
9 believes Defendant will likely violate any conditions of release it may impose if it were to issue a
10 temporary release order. As another Court recently observed, "[w]hile the location monitoring
11 that [defendant] proposed may offer useful information about where he is, it provides little useful
12 information about what he is doing." *United States v. Martin*, 2020 WL 1274857, at *4 (D.Md
13 March 17, 2020). Here, Defendant has been unable or unwilling to remain law-abiding in the
14 past. The Court has no reason to believe he would suddenly become compliant now.

15 Furthermore, supervising a high-risk offender out in the community will place Pretrial
16 Services officers at a heightened risk of contracting the virus. "[L]ocation monitoring is not a
17 limitless resource, nor is its installation and monitoring by the United States Pretrial Services
18 officers without risk to those personnel (who must be trained and certified to install location
19 monitoring) given current recommendations regarding implementation of social distancing." *Id.*
20 For all of the reasons previously summarized regarding Defendant being a flight risk and danger
21 to the community, it is highly likely that the Court would need to expend resources to apprehend
22 him when temporary release period ended and the Court does not find GPS monitoring to be a
23 viable option at this time.

24 In conclusion, Defendant has not established a compelling reason sufficient to persuade
25 the Court that temporary release is necessary. None of the factors that the Court considered
26 weighed in Defendant's favor. Defendant's arguments regarding the risk of outbreak at NSDC
27 are nonspecific to him and are speculative at best. Indeed, Defendant's generalized arguments
28 about risk apply equally to every detainee at NSDC. Additionally, Defendant has failed to

1 demonstrate that his proposed release plan would alleviate his overall COVID-19 risks. The
2 Court further finds that Defendant's proposed release plan would place Pretrial Services officers
3 at risk in supervising him and, when the temporary release inevitably ends, other law enforcement
4 officers and the facility would be placed at risk in re-apprehending Defendant after he has had
5 ample opportunity for contamination. Therefore, Defendant has failed to demonstrate a
6 compelling reason for temporary release.

7 **v. Necessary for Preparation of the Defense**

8 The Court also does not agree that Defendant's temporary release is necessary for the
9 preparation of his defense. Courts considering whether pretrial release is necessary for preparation
10 of defense have analyzed: (1) the time and opportunity the defendant has to prepare for the trial and
11 participate in his defense; (2) the complexity of the case and volume of information; and (3) expense
12 and inconvenience associated with preparing for trial while incarcerated. *Cecerle*, 2014 WL 31674,
13 at *4. These typical considerations, however, are not necessarily relevant to the claims made by
14 defendants seeking release due to COVID-19 concerns.

15 The Court understands that there are reasons that Defendant's counsel may not wish to
16 conduct in person visits at NSDC, but those same reasons would apply to in person visits if he
17 was released. Plus, if he was released, he would not likely have access to video conferencing.
18 The Court also has no evidence that Defendant is being deprived of unmonitored telephone calls
19 with his counsel. Considering all these circumstances, this Court does not find that Defendant's
20 temporary release is necessary to prepare his defense. Therefore, this factor also weighs against
21 temporary release.

22 **IV. CONCLUSION**

23 Defendant has not met his burden of demonstrating a compelling reason that would justify
24 temporary release, or that the circumstances necessitate temporary release for preparation of his
25 defense. The Court also finds that the original detention decision is supported and no circumstances
26 warrant temporary release under the Fifth or Eighth Amendments.

1 **IT IS THEREFORE ORDERED** that Defendant Laquan McDonald's Emergency
2 Motion for Temporary Release Under 18 U.S.C. § 3142(i) Due to COVID-19 Pandemic (ECF
3 No. 22) is **denied**.

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5 DATED: April 3, 2020

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9 DANIEL J. ALBRIGHTS
10 UNITED STATES MAGISTRATE JUDGE
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